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IN THE

Supreme Court of the United States

OCTOBER, 1957 TERM.

No. — 717

JOHN A. STEPHEN, formerly known as HANS AUGSTEIN, and OTTO AUGSTEIN,
Plaintiffs-Respondents,

—against—

ZIVNOSTENSKA BANKA; NATIONAL CORPORATION, also known as Zivnostenska Bank, National Corporation, formerly Zivnostenska Banka or Zivnostenska Bank,
Defendant-Appellant.

JURISDICTIONAL STATEMENT

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No. —

JOHN A. STEPHEN, formerly known as HANS AUGSTEIN, and OTTO AUGSTEIN,

Plaintiffs-Respondents,

—against—

ZIVNOSTENSKA BANKA, NATIONAL CORPORATION, also known as Zivnostenska Bank, National Corporation, formerly Zivnostenska Banka or Zivnostenska Bank,

Defendant-Appellant.

JURISDICTIONAL STATEMENT

Appellant appeals from the final order or judgment of the Court of Appeals of the State of New York, dated October 17, 1957, denying appellant's application for reargument or rehearing and from the judgment of the Court of Appeals of the State of New York entered on July 3, 1957 (both of which are printed as Appendix A hereto) and the judgment entered thereon in the Supreme Court of the State of New York on August 1, 1957 affirming the judgment of said Supreme Court of the State of New York entered on December 6, 1956, which judgment, in turn, affirmed the judgment of said Supreme Court of the State of New York entered on August 6, 1956. The judgment appointed permanent receivers of

the assets, within the State of New York, of the defendant, pursuant to § 977-b of the Civil Practice Act of the State of New York, upon the ground that defendant had been "nationalized" by decree or decrees of the government of Czechoslovakia. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

(a) Opinions Below

The opinion of Mr. Justice Irving L. Levey of the Supreme Court of the State of New York, County of New York, is reported unofficially in 140 N. Y. Supp. (2d) 323, and a copy thereof is attached hereto as Appendix B. It was on the basis of this opinion that an order was made in this action on March 25, 1955, directing a further trial as to whether or not the defendant had been nationalized within the meaning of § 977-b of the Civil Practice Act. Defendant appealed from said order to the Appellate Division, First Department, which affirmed the order without opinion at 286 App. Div. 999. A further trial was then had before Mr. Justice Louis Capozzoli of the Supreme Court of the State of New York, County of New York, who held that the defendant was so nationalized. His opinion, a copy of which is attached hereto as Appendix C, was not reported officially or unofficially, except that the same was printed in the New York Law Journal on June 28, 1956, at page 6 column 6. The judgment entered following this opinion was affirmed by the Appellate Division of the Supreme Court, without opinion, at 2 App. Div. (2d) 958 (Case 10), and the judgment of affirmance entered thereon on December 6, 1956, was affirmed by the Court of Appeals of the State of New York without opinion at 3 N. Y. (2d) 862. The order denying appellant's application for reargument or for rehearing was entered without opinion on October 17, 1957. [3 NY(2d) 941]

(b) Grounds Of Jurisdiction Of The Supreme Court

(i) This action was brought for the appointment of a permanent receiver or receivers of the assets within the State of New York of the defendant, upon the ground that the defendant had been nationalized by decree of the government of the Republic of Czechoslovakia. The plaintiffs alleged that they were creditors of the defendant and brought this action pursuant to the provisions of § 977-b of the Civil Practice Act of the State of New York, which statute authorizes the bringing of such an action for such purposes and upon such grounds by any creditor of a foreign corporation such as Zivnostenska Banka, the defendant herein.

(ii) The date of the judgment or decree of the Court of Appeals of the State of New York sought to be reviewed herein is July 3, 1957, and the date of the judgment of the Supreme Court of the State of New York entered thereon is August 1, 1957. The date of the order of the Court of Appeals of the State of New York denying the appellant's application for reargument or rehearing is October 17, 1957. The notice of appeal herein was filed in the office of the Clerk of the Supreme Court of the State of New York, County of New York, the court having possession of the record, on November 15, 1957.

(iii) It is believed that Title 28 U. S. Code § 1257(2) confers jurisdiction on this court upon this appeal.

(iv) The following cases are believed to sustain the jurisdiction of the Court to review the judgment in this case by appeal:

Adler et al. v. *Board of Education of the City of New York*, 342 U. S. 485;

Standard Oil Co. of California v. *Johnson*, 316 U. S. 481;

Hamilton v. *Regents of the University of California*, 293 U. S. 245;

Chy Lung v. *Freeman*, 92 U. S. 275;

United Automobile Workers v. *Wisconsin E. R. B.*, 351 U. S. 266.

(v) The validity of § 977-b of the Civil Practice Act of the State of New York is involved in the issues to be determined by this Court. The pertinent provisions of said statute are so lengthy that they are not printed here, but are set forth in Appendix D. The Statute may be found in Clevenger's 1957 Civil Practice Act at pages 8-47 to 8-50.

(c) The Questions Presented By This Appeal Are As Follows:

1. Whether § 977-b of the Civil Practice Act of the State of New York and the judgment appointing receivers of the assets of the defendant bank, within the State of New York, pursuant thereto were in violation of the Constitution of the United States, and an invasion of the power over foreign policy exclusively lodged by the said Constitution in the Government of the United States.

2. Whether the State of New York could validly disregard the nationalization decrees of the Government of Czechoslovakia, a government recognized by the United States, and any transfers of title effected by such decrees, as applied to property within the State of New York of Czechoslovakian corporations, and particularly whether it could do so for the benefit of persons other than those who dealt with the branch office or offices within the State of New York of such Czechoslovakian corporations, [redacted].

3. Whether the State of New York could validly disregard such nationalization decrees of Czechoslovakia, as applied to property which was not within the State of New York at the time that the nationalization decrees took effect.

(d) Statement Of The Facts Of The Case Insofar As Material To The Questions Presented By This Appeal

Plaintiff Otto Augstein and his son, the co-plaintiff John A. Stephen, were citizens and residents of the Republic of Czechoslovakia prior to the outbreak of World War II. They had made cash deposits in Prague with the home office of the Zivnostenska Banka, the defendant herein, which at that time was a joint stock banking corporation. Both plaintiffs left Czechoslovakia at or before the German invasion in 1939. When this action was commenced, the plaintiff Otto Augstein was a Canadian citizen.

On October 24, 1945, a decree of the President of the Republic of Czechoslovakia, No. 102 (R. 1 fols. 2206-2238)* was issued pursuant to which joint stock banking companies were "nationalized by transferring them to state ownership * * * and transformed into national enterprises (banks)."

In February 1948, after Decree 102 had become effective, the defendant bank as a national enterprise applied for a license to do business in New York State (T. R. Exs. 14, 20; R. 1, fols. 914-922). This application was granted by the New York Banking Department and a license was issued by the Superintendent of Banks on May 18, 1948, to the defendant bank as a national enterprise (R. 1, fols. 1024-1027). This license was surrendered sometime in March 1949 (R. 1, fol. 1023). The New York Banking Department, therefore, recognized the right of this defendant as a so-called nationalized corporation to do business in the State of New York and to have assets in that State. Moreover, the surrender of such license by the defendant in 1949 and the consequent liquidation of its business in New York State was under the New York Banking Law, which (§ 605) requires the payment of the claims of creditors of such corporation arising out of transactions had by them with its New York agency or agencies; so that the claims of all such creditors of the de-

* The designations "R. 1" and "R. 2" refer, respectively, to Volume 1 and Volume 2 of the Record on Appeal to the New York Court of Appeals.

fendant corporation were satisfied at that time under the supervision of the New York Banking Department.

On March 9, 1950 the National Assembly of the Czechoslovak Republic passed Law No. 31 of 1950 (R. 2, fols. 898-930) pursuant to which there was created the State Bank of Czechoslovakia. Article 2 of this Law provided that the State Bank should take over gradually, according to instructions of the Ministry of Finance "all rights and obligations of the * * * Zivnostenska Banka National Corporation." The same article in subdivision (2) provided that Zivnostenska Banka National Corporation, among others, shall end its activities by transferring to the State Bank all its rights and obligations and "shall cease to exist on a date to be determined by the Minister of Finance in a notice published in the Collection of Laws."

No notice was ever published in the Collection of Laws, but there was published in the Official Gazette of the Republic of Czechoslovakia (roughly similar to our Federal Register), on June 17, 1950 a Proclamation or Notice bearing No. 383 (R. 2, fols. 931-937). This notice provided that on July 3, 1950 the State Bank of Czechoslovakia should take over all the rights and liabilities of Zivnostenska Banka National Enterprise.

In 1952, plaintiff Otto Augstein a resident and citizen of Canada, and his son, John A. Stephen, commenced this action for the appointment of permanent receivers of the defendant's New York assets on the ground that it had been nationalized within the meaning of § 977-b of the Civil Practice Act. The action was commenced by the entry of an order ex parte appointing temporary receivers of the defendant's New York assets. The plaintiffs also obtained an order enjoining and restraining a number of New York banks from transferring or in any way disposing of assets in their possession of either the defendant or the State Bank of Czechoslovakia, the alleged successor of defendant. On a motion made by the plaintiffs to examine these New York banks as to such assets in their possession numerous substantive issues were raised by the defendant, and the State Bank of Czechoslovakia presented a claim for sovereign im-

munity as to its property, which was rejected (R. 1, fols. 609-641). All of the issues thus presented were referred to a referee (Mortimer Hays, Esq.) to hear and report with his recommendations. After numerous hearings extending over a period of two years, the said referee filed a report in which, among other things, he recommended findings (1) that the defendant had not been nationalized within the meaning of § 977-b of the Civil Practice Act, (2) that both plaintiffs were in any event barred from maintaining the action because of the provisions of the Czechoslovak foreign exchange regulations which were binding in the United States by reason of the International Monetary Fund Agreement, and (3) that the plaintiff Stephen was barred by a three-year statute of limitations contained in subdivision 23 of § 977-b of the Civil Practice Act. The defendant moved to confirm the referee's report in that respect and the Supreme Court, New York County, while confirming the report in all other respects, including the finding that Stephen was barred, disaffirmed as to the first two findings above mentioned. The Court held that since Czechoslovakia, as of December 31, 1954, ceased to be a member of the International Monetary Fund, plaintiffs were no longer barred by the International Monetary Fund Agreement. The Court also held that further evidence was necessary to determine whether defendant had been nationalized within the meaning of the statute, and it directed a further trial of that issue (R. 1, fols. 30-32, 2268-2271).

Thereafter the issue of nationalization was retried before Mr. Justice Capozzoli of the New York Supreme Court. At such further trial defendant argued that § 977-b of the Civil Practice Act was unconstitutional as applied to the assets of the defendant within the State of New York, because the statute constituted an unlawful invasion by the State of New York of the powers of the Federal Government over foreign policy, and particularly because the Federal Government had continuously maintained diplomatic relations with Czechoslovakia and had in fact entered into an agreement

with Czechoslovakia concerning the nationalization of properties by Czechoslovakia, and looking toward compensation therefor (R. 2, fols. 79-81, 797 to 807). This question was also argued in the trial brief submitted to Mr. Justice Capozzoli, as directed by the Court (R. 2, fol. 804).

The decision by Mr. Justice Capozzoli (R. 2, fols. 950-971) held that the defendant had been nationalized within the meaning of § 977-b of the Civil Practice Act, and directed judgment for the plaintiff Otto Augstein, appointing permanent receivers of the defendant's New York assets. In making such decision and directing the entry of such judgment, the Court necessarily rejected the defendant's argument that the statute was unconstitutional. The judgment also dismissed the complaint as to plaintiff Stephen.

The defendant appealed from such judgment to the Appellate Division, First Department, which affirmed the same without opinion, and in so doing again rejected the defendant's argument on the Constitutional grounds. The Appellate Division did, however, grant leave to the defendant to appeal to the Court of Appeals of the State of New York (R. 2, fols. 991-998) and the defendant did so appeal, and there again urged that the statute and the judgment entered in this action violated the Constitution of the United States. The Court of Appeals affirmed the judgment, again without opinion, but certified in its judgment of July 3, 1957, as amended by its order of October 17, 1957:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz: the defendant argued that section 977-b of the New York Civil Practice Act and the appointment of a receiver pursuant thereto were in violation of established principles of constitutional law and in conflict with the foreign policy of the United States. This Court held that there was no such violation or conflict."

(e) The Substantial Nature Of The Questions Presented On This Appeal

Under § 977-b of the New York Civil Practice Act, the New York Courts have immobilized all of the New York assets of the defendant and also assets of the State Bank of Czechoslovakia and have seized the assets of the defendant, claiming the right to do so solely because New York does not approve of the nationalization program of Czechoslovakia. They have done this not for the benefit of local creditors, but for the benefit of creditors and stockholders of the defendant bank all over the world. Moreover, the judgment seizing the property of the defendant makes no distinction whatsoever as to property which came into the State of New York before or after the nationalization of the defendant.

The validity of § 977-b of the Civil Practice Act under the Constitution of the United States has never been specifically passed upon by this Court, but doubt as to its validity has been expressed both by this Court and by other Federal Courts. Thus, in *United States* v. *Pink*, 315 U. S. 203, this Court noted at page 231, that § 977-b of the Civil Practice Act expressed a policy which this Court held to be in conflict with federal policy and federal power.

In *Steingut* v. *Guaranty Trust Co. of New York*, 58 Fed. Supp. 623, affirmed on the opinion below at 161 Fed. (2d) 571, the Court held at page 634 as follows:

> "Manifestly, New York policy is not globular, is not designed to eliminate obstacles to friendly relations between the two nations, and erects a system of its own for the collection and distribution of the Russian assets. What New York can do every state can do; and in so doing, it is clear that 'the power of recognition might be thwarted or seriously diluted.' Id., 315 U. S. at page 230, 62 S. Ct. at page 565, 86 L. Ed. 796. To summarize: by means of § 977-b and the orders made herein, New York has gone beyond the

> establishment of a device for the protection of its citizens who are creditors of Russo-Asiatic or of those who did business with it in New York; it has established a complete system of administration founded upon a policy of non-recognition of the Russian nationalization decrees insofar as New York assets are concerned. Enforcement of this policy 'would collide with and subtract from the Federal policy;' Id., 315 U. S. at 231, 62 S. Ct. at page 566, 86 L. Ed. 796. It must, therefore, yield."

And in *United States* v. *National City Bank of New York*, 90 Fed. Supp. 448, the Court held at page 450:

> "§ 977-b, though enacted in 1936, after recognition of Soviet Russia, is, in its application to Russo-Asiatic, fore and aft, starboard to port, keel to masthead, built upon the conception of non-recognition. It collides head-on with the national policy embraced in recognition and the Litvinov assignment. This case is not distinguishable from U. S. v. Pink, 1942, 315 U. S. 203, 62 S. Ct. 552, 86 L. Ed. 796, as the Receivers contend, by the circumstance that in the Pink case local creditors had been paid. The local creditors in the Pink case were 'creditors whose claims arose out of dealings with the New York branch,' 315 U. S. at page 226, 62 S. Ct. at page 564, of the First Russian Insurance Co. Russo-Asiatic never had a branch in New York."

The United States has at all times prior to and since the nationalization program of Czechoslovakia, maintained diplomatic relations with Czechoslovakia and indeed, in 1946, entered into an agreement with Czechoslovakia dealing in part with the effects of the nationalization program and looking toward eventual compensation therefor on behalf of American citizens (61 Stat. 2431-2435, par. 7).

We believe that the judgment in question, and the statute in question constitute an unlawful invasion by the State of New York of a field reserved exclusively to the Federal Government by the Constitution of the United States, and also conflict with the foreign policy of the United States as expressed in its recognition of the government of Czechoslovakia and of its nationalization program.

In *United States* v. *Belmont,* 301 U. S. 324, an action in which the United States Government sought to recover a deposit with the defendant originally made by a Russian corporation, which had been nationalized by Soviet Russia and whose interests had been assigned by the Soviet Government to the United States, this Court held that the policy of the State of New York not to recognize confiscatory acts of the Soviet Government could not be enforced in contradiction of the national policy of recognizing the Soviet Government and its nationalization decrees. This Court stated at pages 331, 332:

> "* * * In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist. Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation, state constitutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power. Cf. Missouri v. Holland, 252 U. S. 416; Asakura v. Seattle, 265 U. S. 332, 341."
>
> * * * * *
>
> "What another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration here. Such nationals must look to their own government for any redress to which they may be entitled."

In *United States v. Pink*, 315 U. S. 203, the United States Government sued to recover assets of the First Russian Insurance Company which were held by the defendant Pink as Superintendent of Insurance of the State of New York. The said insurance company having been nationalized by the Soviet Government, its property in New York was taken over by the Superintendent of Insurance who paid the claims of all those who had done business with the New York branch. The New York Court of Appeals had then directed the defendant to dispose of the balance by paying the claims of foreign creditors. The United States claimed title to these funds by virtue of the Litvinov Assignment which was delivered to the United States at the time it recognized the Soviet Government. This court held at pages 226, 227:

> "At the outset, it should be noted that, so far as appears, all creditors whose claims arose out of dealings with the New York branch have been paid. Thus we are not faced with the question whether New York's policy of protecting the so-called local creditors by giving them priority in the assets deposited with the State (Matter of People, 242 N. Y. 148, 158-159, 151 N. E. 159) should be recognized within the rule of Clark v. Williard, 294 U. S. 211, or should yield to the Federal policy expressed in the international compact or agreement. Santovincenzo v. Egan, 284 U. S. 30, 40; United States v. Belmont, supra. We intimate no opinion on that question. The contest here is between the United States and creditors of the Russian corporation who, we assume, are not citizens of this country and whose claims did not arise out of transactions with the New York branch. The United States is seeking to protect not only claims which it holds but also claims of its nationals."

And at pages 231-232:

> "Enforcement of New York's policy as formulated by the Moscow case would collide with and subtract

from the Federal policy, whether it was premised on the absence of extraterritorial effect of the Russian decrees, the conception of the New York branch as a distinct juristic personality, or disapproval by New York of the Russian program of nationalization. For the Moscow case refuses to give effect or recognition in New York to acts of the Soviet Government which the United States by its policy of recognition agreed no longer to question. Enforcement of such state policies would indeed tend to restore some of the precise impediments to friendly relations which the President intended to remove on inauguration of the policy of recognition of the Soviet Government. In the first place, such action by New York, no matter what gloss be given it, amounts to official disapproval or non-recognition of the nationalization program of the Soviet Government. That disapproval or non-recognition is in the face of a disavowal by the United States of any official concern with that program. It is in the face of the underlying policy adopted by the United States when it recognized the Soviet Government. In the second place, to the extent that the action of the State in refusing enforcement of the Litvinov Assignment results in reduction or non-payment of claims of our nationals, it helps keep alive one source of friction which the policy of recognition intended to remove. Thus the action of New York tends to restore some of the precise irritants which had long affected the relations between these two great nations and which the policy of recognition was designed to eliminate."

Finally, the Supreme Court held, at page 233:

"The action of New York in this case amounts in substance to a rejection of a part of the policy underlying recognition by this nation of Soviet Russia. Such power is not accorded a State in our constitutional system. To permit it would be to sanction a

dangerous invasion of Federal authority. For it would 'imperil the amicable relations between governments and vex the peace of nations.' Oetjen v. Central Leather Co., supra, p. 304. It would tend to disturb that equilibrium in our foreign relations which the political departments of our national government had diligently endeavored to establish.

"We repeat that there are limitations on the sovereignty of the States. No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively."

See also:

Steingut v. *Guaranty Trust Co. of New York* (*supra*);

U. S. v. *National City Bank of New York* (*supra*);

U. S. v. *New York Trust Company*, 75 Fed. Supp. 583.

The cases above cited were not based solely upon the fact that the United States Government was the claimant of the fund; the United States was held to have succeeded only to such rights as the Soviet Government had before the Litvinov Assignment:

Guaranty Trust Co. v. *U. S.*, 304 U. S. 126, 141-143;

U. S. v. *New York Trust Company* (*supra*), pp. 586, 587.

Although the *Pink* and *Belmont* cases did not deal with § 977-b of the Civil Practice Act and did not deal with Czechoslovakia or its nationalization program, we believe that the same principles there expressed are applicable in the case at bar.

The power to regulate foreign policy, like the power to regulate foreign commerce, is granted exclusively by the Constitution to the Federal Government. The effect of what any one State may do, which involves either of such fields, is felt not by that State alone, but by the entire Nation.

Chy Lung v. *Freeman*, 92 U. S. 275;

Henderson v. *Wickham*, 92 U. S. 259.

Moreover, we submit that even if New York had the power to act under § 977-b of the Civil Practice Act, it did not have the power to do so with respect to property of the defendant which was not within the State of New York at the time of nationalization. The mere continuance of diplomatic relations with Czechoslovakia subsequent to the nationalization of defend[illegible]t required the State of New York to recognize any change in title to at least such property as was not within the State of New York, which resulted from such nationalization.

Oetjen v. *Central Leather Co.*, 246 U. S. 297, 303, 304;

Ricaud et al. v. *American Metal Co., Ltd.*, 246 U. S. 304, 310.

The judgment in question makes no distinction whatsoever with respect to the time as of which the property seized thereby came into the State of New York.

We believe these questions are substantial and require the plenary consideration of this Court with briefs on the merits and oral argument, for their resolution. The problem involved in this case directly affects the relations between the United States and Czechoslovakia and obviously may affect the relations between the United States and other countries of both the East and the West. The question involved in its essence and reduced to its simplest terms, is whether New York or any other State in the United States may adopt and enforce a policy of refusing to recognize the nationalization

decrees of a foreign country with which the United States maintains diplomatic relations, particularly where the federal government has adopted a policy of recognizing such decrees. In this day and in these times, this question seems to us of paramount importance.

WHEREFORE, for the reasons above set forth, the federal questions are substantial and should be given plenary consideration by this Court with briefs on the merits and oral argument.

Respectfully submitted,

LEMUEL SKIDMORE,
Attorney for Appellant,
165 Broadway,
New York 6, N. Y.

APPENDIX A

Judgment Of Court Of Appeals

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 3rd day of July in the year of our Lord one thousand nine hundred and fifty-seven, before the Judges of said Court.

Witness,

The HON. ALBERT CONWAY,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

REMITTITUR July 3, 1957.

No. 68

JOHN A. STEVEN, formerly known as HANS AUGSTEIN, and OTTO AUGSTEIN,

Respondents,

ZIVNOSTENSKA BANKA, NATIONAL CORPORATION, &c.,

Appellant.

BE IT REMEMBERED, that on the 1st day of March, in the year of our Lord one thousand nine hundred and fifty-seven, Zivnostenska Banka, National Corporation, &c., the appellant—in this cause, came here unto the Court of Appeals, by Putney, Twombly, Hall & Skidmore, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And John A. Steven, formerly known as Hans Augstein, and Otto

Augstein, the respondents in said cause, afterwards appeared in said Court of Appeals by Alexander Slater and Abraham Wolf, their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, the said Court of Appeals having heard this cause argued by Mr. Lemuel Skidmore, of counsel for the appellant, and by Mr. Murray L. Jacobs, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals
of the State of New York.

APPENDIX A (continued)

Order Amending Judgment And Denying Reargument

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the seventeenth day of October A. D. 1957.

Present, HON. ALBERT CONWAY,
Chief Judge Presiding.

No. 358

JOHN A. STEVEN, formerly known as HANS AUGSTEIN, and OTTO AUGSTEIN,
Respondents,

vs.

ZIVNOSTENSKA BANKA, NATIONAL CORPORATION, &c.,
Appellant.

A motion for reargument or, in the alternative, to amend the remittitur in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks reargument, be and the same hereby is denied with ten dollars costs and necessary printing disbursements, and it is

FURTHER ORDERED, that the said motion, insofar as it seeks to amend the remittitur, be and the same hereby is granted. Return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz: the defendant argued that section 977-b of the New York Civil Practice Act and the appointment of a receiver pursuant thereto were in violation of established principles of constitutional law and in conflict with the foreign policy of the United States. This Court held that there was no such violation or conflict.

AND the Supreme Court, New York County, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

GERSON KIMBALL,
Deputy Clerk.

APPENDIX B

Opinion By Levey, J., On Motions To Confirm and Disaffirm Referee's Report

Stephen v. Zivnostenska Banka National Corp'n—The plaintiffs in this proceeding, father and son, seek to throw the assets of the defendant bank into permanent receivership upon the premise that they are creditors of an institution which has been "nationalized" within the meaning of section 977-b of the Civil Practice Act.

The temporary receivers, appointed by the court, have moved to examine certain New York banks, reputed to be holding funds for defendant's account.

Because of the many and complicated issues involved, one being the sensitive area of relationship between the United States and Czechoslovakia, it was deemed desirable to assign the entire matter to a referee to hear and fully report.

Initially, eight definite items of inquiry were agreed upon, and thereafter two pending applications were added, one relating to a bond of indemnity and the other to a release of certain funds.

The referee held seventeen hearings and filed an exhaustive report, consisting of seventy-seven pages. Pleasing to the court was the consensus of opinion by all counsel regarding the impartial and conscientious manner in which the hearings were conducted. The report reflects and justifies counsel's praise.

After extended oral arguments and consideration of the briefs submitted, I have reached the conclusion that the referee's report warrants confirmation in all respects except for the findings in connection with (1) nationalization, and (2) the plaintiffs' standing as creditors.

Concerning the first exception, it appears that section 977-b was enacted by the Legislature of this state to protect domestic creditors and stockholders from the confiscatory decrees of the Soviet government, promulgated in the early days of the Communist revolution.

Prior to its enactment, a sizeable body of case law had been developed in efforts to cope with Soviet decrees which sought to seize the assets of various Russian banks, insurance companies and other corporations (see, e.g., Moscow Fire Ins. Co. v. Bank of N. Y., 280 N. Y., 286, 305 (1939); Russian Reinsurance Co. v. Stoddard, 240 N. Y. 149, 163 (1925); Fred S. James & Co. v. Second Russian Insurance Co., 239 N. Y., 248, 256 (1925).

Presently, we are confronted with the problems of Czech nationalization, just as once before we wrestled with the intricacies of Soviet Russian decrees (see, Augstein v. Banska, 125 N. Y. S. 2d 647; also the numerous cases of Bata v. Bata, 279 App. Div., 855 and 1002, 304 N. Y., 644; also Bata National Corp'n v. Anchor Mercantile Co., Inc., N. Y. L. J., August 19, 1949, aff'd 276 App. Div., 896).

In a case similar to the one under review, Bata v. Bata A.S. & Svit National Corporation (Supreme Court, New York County, April 2, 1953, Index 32473, 1948), Justice Greenberg held that the plaintiff had established her right to the appointment of a permanent receiver pursuant to the provisions of section 977-b, where assets of the defendant Bata A.S. had been appropriated by the Czech government and later transferred to the Svit National Corporation, a creature of the Czech state.

It is evident in the instant case that the defendant bank was taken over by the Czech government and transformed into a national corporation by decree No. 102 of 1945. Defendant maintains in this connection, however, that its affairs have not been wound up nor is it in the process of liquidation, but article 2 of Law No. 31 of 1950 appears to be in direct contradiction of this view, since the Zivnostenska Banka "shall end (its) activities * * * and shall cease to exist on a day to be determined by the Minister of Finance in a notice published in the collection of laws."

On the other hand, there is testimony by a witness for the plaintiffs that the notice, just referred to, has not been published.

Defendant, conceivably, may still be in a position to meet its obligations to stockholders and creditors, but in the face of the facts now available, it should bear the burden of showing both its capacity and willingness to meet its responsibilities. At least, more information is essential as to current conditions.

Hence, the findings of the referee are modified to the extent of ordering a trial of this issue at an early date, in accordance with section 977-b, subdivision 9, C. P. A.

Regarding the second exception, that relating to the plaintiff's standing as creditors, as influenced by the International Monetary Fund Agreement, the referee noted the membership of Czechoslovakia in the International Monetary Fund, and considered particularly that portion of article VIII, section 2(b), of the Fund Agreement: "Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member."

He therefore concluded that the plaintiffs could not obtain relief in this court (Perutz v. Bohemian Discount Bank in Liquidation, 304 N. Y., 533).

However, he did state, and with mindful foresight, that this phase could be reopened if Czechoslovakia ever withdrew, voluntarily or otherwise, from the fund organization. Such circumstance actually occurred on January 5, 1955, when the International Monetary Fund issued a release that Czechoslovakia was no longer a member (see photostats: letter from Department of State, dated January 10, 1955; together with press release No. 230; and Resolution of International Monetary Fund; filed herewith).

No valid reason currently exists to frustrate our public policy, as expressed in the controlling statute, and thereby allow Czechoslovakia to take advantage of one of the privileges of fund membership when it is no longer a member (see Bernstein v. N. V. Nederlandsche-Amerikaansche, 210 F. 2d 375 [Second Circuit, 1954]: Perutz v. Bohemian Discount

Bank in Liquidation, 304 N. Y., 533; Plesch v. Banque Nationale de la Republique d'Haiti, 273 App. Div., 244, aff'd 298 N. Y., 573; Bollack v. Societe Generale Pour Favoriser, &c., 263 App. Div., 601; Sulyok v. Penzintezeti Kospont Budapest, 279 App. Div., 528; Stern v. Pesti Magyar Kereskedelmi Bank, 303 N. Y., 881; Freund v. Laenderbank Wien Aktiengesellschaft, 277 App. Div., 770; Sabl v. Laenderbank Wien Aktiengesellschaft, 30 N. Y. S. 2d 608).

Accordingly, the present status of Czechoslovakia in relation to the International Monetary Fund does not bar the plaintiffs in this action.

The order fixing the referee's fee, which was agreed upon by counsel, is signed.

There is a dispute between the parties as to the liability for payment of the stenographer's fees. Such fee shall be divided equally.

The receiver's motion to examine the New York banks, which was held in abeyance pending the hearing and report of the referee, is now denied, without prejudice, pending the trial. Settle order.

APPENDIX C

Opinion By Mr. Justice Capozzoli

[SAME TITLE.]

This action was brought under Section 977-b, Subdivision 1, of the Civil Practice Act by the plaintiffs, as creditors, for the appointment of a permanent receiver of the defendant's assets within the State of New York on the ground that the defendant was nationalized, within the meaning of the aforementioned section.

The action was commenced by the entry of an ex parte order on May 3, 1952, appointing receivers of the defendant's New York assets. On May 12, 1952, an order was entered directing the various banks in the State of New York to show cause why they should not be examined in aid of the temporary receivership as to the assets of the defendant and of its alleged successor, State Bank of Czechoslovakia. This order contained a provision restraining the several banks from disposing of the assets of the defendant and of its alleged successor. On May 21, 1952, the restraining provision as to the State Bank of Czechoslovakia was modified so as to limit same only as to such assets of that bank as the domestic banks had on hand when the original restraining order was served upon them.

The defendant appeared in the action and filed an answer to the complaint. Many substantive questions of law and fact have been raised in the course of this proceeding. The State Bank of Czechoslovakia, although not a party to the action, filed a claim of immunity as to its property affected by the restraining order of May 12, 1952, on the ground that it was an instrumentality of the sovereign state of Czechoslovakia.

Because of the many and complicated issues involved, Mr. Justice Irving I. Levey, of this court, before whom the case came up originally, assigned the entire case to a Referee to hear and fully report. In all, ten definite items of inquiry

were agreed upon and, after many hearings, the Referee filed a report on July 20, 1954, consisting of seventy-seven pages. Mr. Justice Levey confirmed the report of the Referee in all respects except for the findings, one, nationalization, and two, plaintiffs' standing as creditors.

As to the second exception, Mr. Justice Levey did not confirm the findings of the Referee because, since the filing of the Referee's report, and on the 5th day of January, 1955, the International Monetary Fund issued a release to the effect that Czechoslovakia was no longer a member. This being so, Mr. Justice Levey held that Czechoslovakia could not claim the benefit of the privileges extended to members of the fund, one of which was the exemption of a member nation from any court action in the territory of another member nation, under certain conditions which the Referee found were present in the case before him. Therefore, Justice Levey ruled that the plaintiffs' standing as creditors was not affected by the then status of Czechoslovakia in relation to the International Monetary Fund.

As to the first exception, that of nationalization, Mr. Justice Levey reviewed briefly the reasons for the enactment of Section 977-b of the Civil Practice Act and referred to a number of cases decided before and after the enactment of said section. He concluded as follows: "Defendant, conceivably, may still be in a position to meet its obligations to stockholders and creditors, but in the face of the facts now available, it should bear the burden of showing both its capacity and willingness to meet its responsibilities. At least, more information is essential as to current conditions. Hence, the findings of the Referee are modified to the extent of ordering a trial of this issue at an early date, in accordance with Section 977, subd. 9, C. P. A."

The order of Mr. Justice Levey was affirmed by the Appellate Division (see 286 App. Div. 999).

Therefore, this court has limited the trial before it to the issue of nationalization, with a consideration of whether the defendant has the capacity and willingness to meet its responsibilities to stockholders and creditors, as provided by

Mr. Justice Levey. This court will not consider anything else. Whatever has been heretofore decided will not be reviewed by this court despite the contention of the defendant. This court does not agree that only a portion of the issue of nationalization is before it. It is of the opinion that the entire issue of nationalization is open. It believes further that, under the order of Mr. Justice Levey, the burden of going forward with proof on the capacity and willingness of the defendant to meet its responsibilities is upon the defendant, but the ultimate burden of proof on the entire issue of nationalization is upon the plaintiffs. In other words, the plaintiffs must establish, by a fair preponderance of evidence, that the defendant bank was nationalized, as set forth in the Civil Practice Act, Section 977-b, Subdivision 1.

At the trial before this court the defendant read into the record lengthy depositions of Dr. Jaraslav Fukatko, the chairman of the board of directors of the defendant, and Ivan Petr, the manager. These depositions were taken in the Peoples' Court of Prague, Czechoslovakia. The testimony was offered to support the contention of the defendant that it has the capacity and the willingness to meet its responsibilities, that it has not been nationalized within the meaning of the Civil Practice Act and that it is actually doing business.

The testimony of these witnesses is entirely unsatisfactory. They were unable to produce a balance sheet, book entries, financial statements or any factual proof bearing upon the activities of the defendant and its assets and liabilities. They refused to give certain other information without permission of government authorities, yet they repeatedly asserted that the defendant is doing business and there has been no order issued by the Czechoslovakian government terminating its existence.

At this point the court invites attention to Plaintiffs' Exhibit 1 in evidence. This exhibit is a copy of Law No. 31 of 1950, enacted by the National Assembly of the Czechoslovak Republic, on the 9th day of March, 1950. Article 2 of this law provides as follows:

> "(1) The Bank shall take over gradually, according to the instructions of the Ministry of Finance, all rights and obligations of the * * * 2. Zivnostenska Banka National Corporation * * *. (2) The institutions mentioned in paragraph (1) shall end their activities by transferring to the Bank their rights and obligations, and shall cease to exist on a day to be determined by the Minister of Finance in a Notice to be published in the Collection of Laws."

The wording of the last mentioned exhibit forces the conclusion that the defendant shall end its activities by a gradual transferring over of its rights and obligations and shall cease to exist on a day determined by the minister of finance, in a notice published in the Collection of Laws.

The question, therefore, is presented, as to whether the defendant is still doing business or is it out of business and no longer in existence. In this connection it is important to know whether the minister of finance ever issued the notice referred to in Plaintiffs' Exhibit 1. The defendant's witnesses, in their depositions repeatedly stated that such notice was never issued by the ministry, nor was its issuance contemplated.

When an examination is made of Plaintiff's Exhibit 2, in evidence, and its contents read, it is difficult to understand the attitude and the testimony of these witnesses. Plaintiffs' Exhibit 2 is entitled "Proclamation or Notice No. 383 of the Ministry of Finance, of June 17th, 1950," and it provides, amonst other things, as follows:

> "The Finance Ministry hereby publishes the following notice of instructions, pursuant to Article 2, Subd. 1 of the Law No. 31 of 1950 of the Collection of Laws, concerning the State Bank of Czechoslovakia. (1) On the 3rd day of July, 1950, the State Bank of Czechoslovakia shall take over, besides the rights and liabilities listed in paragraphs 2 and 3 hereof, all the rights and liabilities of * * * the Zivnostenska Banka

> National Enterprise * * *, as of the state of business at the end of the second planning quarter of 1950, i.e. as of the 2nd day of July, 1950, e.g. their cash on hand, securities and coupons, bills of exchange and checks * * *."

It is true that the publication of this notice, Plaintiffs' Exhibit 2, was made in the official gazette of the Republic of Czechoslovakia, rather than in the so-called Collection of Laws. But this is immaterial. What is important is the fact that the Ministry of Finance did exercise the authority granted to it by Plaintiffs' Exhibit 1, which resulted in the issuance of Plaintiffs' Exhibit 2. Surely, if there is any explanation for Plaintiffs' Exhibit 2 it should come from the defendant. But the record is silent as to any references to this exhibit by any of the witnesses of the defendant. Should not the chairman of the board have known that such an order of the Finance Ministry had been issued and should he not have given some explanation about it instead of denying that such an order was ever issued?

Since Plaintiffs' Exhibit 1 says that defendant "shall cease to exist on a day to be determined by the Minister of Finance, in a notice published in the Collection of Laws," and since such notice was published by the Ministry on June 17, 1950, Plaintiffs' Exhibit 2, how can the defendant's witnesses continue to testify, under oath, that no such notice mentioned in Plaintiffs' Exhibit 1 was ever issued or being contemplated and that the defendant is still doing business without any interference from the government? The conclusion is irresistible that the defendant has ceased to do business, it no longer exists and that it has not the capacity nor willingness to meet its responsibilities to stockholders and creditors.

When it is further considered that the defendant seeks to justify the non-payment of the claims of the plaintiffs on the ground that their property was confiscated by government decree, resulting from their adjudication as enemies of the state, certainly the courts of this jurisdiction should apply

the provisions of Section 977-b of the Civil Practice Act, which to this court seem to be aptly applicable to the factual situation at bar (Bata v. Bata, 285 App. Div. 1050).

The application of the plaintiff for an extra allowance is not being considered at this time. It should be made at the time of the settlement of the receiver's account, in accordance with the Civil Practice Act, Section 977-b, Subdivision 16-a.

This court agrees with the defendant that the complaint as to the plaintiff, John A. Stephen, should be dismissed on the strength of the finding by the Referee, confirmed by Mr. Justice Levey, that the plaintiff, John A. Stephen, was barred from maintaining this action by the three year statute of limitations contained in the Civil Practice Act, Section 977-b, Subdivision 23.

For the reasons above stated the court finds that the defendant has been nationalized under Section 977-b, Subdivision 1, of the Civil Practice Act and that the receivership be made permanent as to the plaintiff, Otto Augstein. The complaint is dismissed as to the plaintiff, John A. Stephen.

Settle judgment accordingly.

This constitutes the decision of the court in accordance with Section 440 of the Civil Practice Act.

APPENDIX D

Pertinent Provisions of Civil Practice Act, Section 977-b

§ 977-b. *Receivers to liquidate assets of foreign corporations.* 1. An action may be instituted in the supreme court for the appointment of a receiver of the assets in this state of a foreign corporation, whenever such foreign corporation has assets or property of any kind whatsoever, tangible or intangible, within the state of New York, and (a) it has heretofore been or is hereafter dissolved, liquidated or nationalized or (b) its charter or organic law has heretofore been or hereafter is suspended, repealed, revoked or annulled, or (c) it has heretofore ceased or hereafter ceases to do business whether voluntarily or otherwise or by reason of the expiration of the term of its existence or by revocation or annulment of its organic law or by dissolution or otherwise.

2. Such action may be commenced by any domestic or foreign creditor, judgment creditor or attachment creditor or stockholder of such corporation, or by any plaintiff on whose behalf a warrant of attachment against the property of such corporation has heretofore been or may hereafter be issued.

3. Service of the summons in such action may be made personally within the state of New York, by delivery of the same to any officer or director of the corporation, or by publication pursuant to an order obtained as hereinafter provided.

4. Upon an affidavit reciting that personal service of the summons cannot be effected within the state of New York with due diligence and upon a summons and verified complaint alleging that the defendant is a foreign corporation and has or may have or may be entitled to assets, credits, choses in action or other property, tangible or intangible within the state and that such corporation has been dissolved,

nationalized, or that its charter or organic law has been suspended, repealed, annulled or revoked, or that it has ceased to do business, plaintiff may apply, without notice, to the supreme court or any judge or justice thereof for the appointment of a temporary receiver pending the determination of the action and the court must thereupon appoint such receiver who shall, from time to time, file such undertakings as the court may direct and shall take, receive and reduce to his possession any and all assets, credits, choses in action and property, tangible and intangible, in the state of New York of the said foreign corporation and hold the same until the further order of the court. (Subd. 4 as amended by L. 1938, ch. 604, April 9.)

5. An order directing service by publication of the summons shall be made upon application of a plaintiff in any action brought pursuant to this section and must be founded upon verified complaint, containing the allegations set forth in subdivision four hereof, and upon an affidavit reciting that personal service of the summons cannot be effected within the state with due diligence and that a temporary receiver of its property within the state of New York has been appointed pursuant to this section in such action and that a copy of the order appointing the receiver has been served personally by or on behalf of such receiver upon a person, firm or corporation holding property, tangible or intangible, of the said foreign corporation, or against whom a claim or demand in favor of such foreign corporation exists and that demand therefor has been made upon such person, firm or corporation by or on behalf of such receiver.

* * * * *

10. In the event that the defendant defaults in answering, or if after a trial the court is satisfied that the defendant has ceased to do business by reason of any thing or matter whatsoever, or that it has been dissolved, liquidated or nationalized, or its charter or organic law has been suspended, repealed, revoked or annulled, the court must thereupon direct

judgment, appointing a permanent receiver and directing the receiver to liquidate the assets, credits, choses in action and property, tangible and intangible, in the state of New York of the said defendant, in the manner herein provided for. (Subd. 10 as amended by L. 1938, ch. 604, April 9.)

* * * * *

16. Upon settlement of the receiver's account, the court must direct payment in the following order and manner:

a. The costs and expenses of the action and of the receivership and the commissions and allowances and attorneys' fees in connection therewith shall first be paid, and if the court is satisfied that the action has been of benefit to the creditors of the said defendant it may allow the plaintiff his reasonable expenses including attorneys' fees in connection with such action.

b. The allowed claims, if any, of creditors with valid attachments issued out of any court in the state prior to the commencement of an action pursuant to this section, shall then be paid in the order of their priority. Attachments issued after the commencement of an action for the appointment of a receiver pursuant to this section shall be entitled to no priority by reason thereof.

c. The allowed claims which prior to the appointment of a receiver hereunder, accrued to or arose, wholly or partly, in favor of persons residing and corporations organized in the United States or in a state thereof and the allowed claims based on causes of action which accrued or arose in the state of New York shall then be paid.

d. The allowed claims of all other creditors of the corporation shall then be paid.

Any surplus remaining after making all of the aforesaid payments in the order mentioned shall then be paid to the stockholders of the corporation who have proved claims as such pro rata in accordance with their stockholdings, or in

the discretion of the court, to the receiver or liquidator, if any, appointed in the domicile of the corporation or elsewhere, provided such receiver or liquidator has proved his right thereto. (Subd. 16 as amended by L. 1938, ch. 604, April 9.)

17. Thereafter and as often as practicable the receiver shall file further accounts and give notice thereof as provided in subdivision fourteen hereof until the assets are entirely liquidated and distributed as hereinbefore provided.

18. The time between the cessation of business by the corporation or its dissolution or nationalization or the suspension, repeal, revocation or annulment of its charter or organic law, and the appointment of a receiver in this state pursuant to this section, whichever time is longer, plus three years after such appointment, shall not be a part of the time limited by domestic or foreign law for the commencement of an action or for the assertion of a claim therein by or on behalf of or against said corporation or by or against said receiver, whether or not said action or claim has heretofore been barred by any statute of limitations of this state or of any other state or country. (Subd. 18 as amended by L. 1938, ch. 604, April 9.)

19. Title to all assets, credits, choses in action and property, tangible and intangible, or any and every kind whatsoever, which such corporation owns, is entitled to or may be entitled to claim or receive within the state of New York shall immediately vest in the receiver upon the making of the order appointing him. The existence of such corporation and causes of action of or against such corporation existing at the time of its liquidation, dissolution, nationalization, expiration of its existence, repeal, suspension, revocation or annulment of its charter or organic law, or arising thereafter shall not be deemed ended, abated or affected thereby, nor shall actions brought by or against such corporation or a receiver appointed hereunder or any remedy therein be

deemed to have ended or abated or to have been affected by reason of such liquidation, dissolution, nationalization, expiration of its existence or suspension, repeal, revocation or annulment of its charter or organic law. This provision shall apply to all property, tangible and intangible, debts, demands and choses in action of such corporation within the state of New York, and to all litigation heretofore or hereafter brought in the courts of the state or of the United States to which the corporation or the receiver of said corporation appointed pursuant to the provisions of this section is a party. Any receiver appointed pursuant to the provisions of this section may be substituted for such corporation in any action or proceeding pending in the courts of the state or of the United States to which such corporation is a party and may intervene in any action or proceeding which relates to or affects any of the assets or claims of the corporation and may revive any action which shall have heretofore or which may hereafter have abated, and such liquidation, dissolution, nationalization, expiration of its existence, or repeal, suspension, revocation or annulment of its charter or organic law in the country of its domicile, or any confiscatory law or decree thereof, shall not be deemed to have any extraterritorial effect or validity as to the property, tangible or intangible, debts, demands or choses in action of such corporation within the state or any debts or obligations owing to such corporation from persons, firms or corporations residing, sojourning or doing business in the state. Nothing contained in this subdivision shall be deemed to validate claims for or causes of action or actions to recover property located in or moneys payable in the domicile of the corporation which are unenforcible under the laws of such domicile. (Subd. 19 as amended by L. 1941, ch. 926, May 1; L. 1938, ch. 604.)

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